

Board Administration and Regulatory Coordination Unit

Division 3. Air Resources Board

Chapter 1. Air Resources Board

Subchapter 1.25. Administrative Procedures–Hearings

Article 4. Administrative Hearing Procedures for Review of Citations

Subarticle 7. Discovery, and Subpoenas and Subpoenas Duces Tecum

§ 60075.26. Discovery.

(a) Exclusivity of Discovery Provisions.

The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by this chapter.

(b) Document Exchange.

(1) After initiation of a proceeding, a party, upon written request made to another party is entitled, prior to the hearing, to inspect and make a copy of any document, thing, statement or other writing relevant to the issues for hearing which is in the control of the other party and which is relevant and would be admissible in evidence, including, but not limited to, any statements of parties or witnesses relating to the subject matter of the proceeding, all writings or things which the party then proposes to offer in evidence, and any inspection or investigative reports prepared by or on behalf of any party.

(3) The parties shall exchange the requested information at a time mutually agreed to by the parties, or if no agreement has been reached, no later than 30 days after a request has been made. Documents shall be served upon the requesting party pursuant to section 60075.4(b).

(4) Unless other arrangements are made, the party making the request shall pay the reasonable costs of copying the requested materials.

(5) A party claiming that certain writings or things are privileged against disclosure shall serve on the requesting party a written statement setting forth what matters are claimed to be privileged and the reasons therefore.

(c) Identity of Witnesses and Exhibits

(1) No later than 10 days before the scheduled hearing date, the parties shall submit to the hearing office and serve upon the other parties:

(A) A list of the names, addresses and qualifications of proposed witnesses and a brief summary of the testimony to be presented by each witness; and

(B) Each document or other exhibit, the party expects to offer or may offer, if the need arises, into evidence.

(2) The hearing officer may prohibit any party from presenting any witness or exhibit that has not been included on that party's witness list or in submitted exhibits as required under paragraph (c)(1) of this section.

(d) Depositions.

(1) Unless otherwise stipulated to by the parties, depositions shall be limited to the following:

(A) A party may petition the hearing office to request that it be allowed to take the testimony of a material witness who is either unable to attend or cannot be compelled to attend a hearing on the merits may be obtained by deposition in the manner prescribed by law for depositions in civil actions;

(B) The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of the testimony; a showing that the witness will be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose;

(C) The petitioner shall serve notice of the deposition and a copy of the petition on the other parties at least 10 days before the date set for the deposition.

(2) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.

(e) Protective Orders:

(1) Upon motion by a party or by the person from whom discovery is sought, or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.

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(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:

- (A) The appropriate scope and terms of any governing protective order;
- (B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and
- (C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.

(3) A party or person seeking a protective order may be permitted to make all or part of the required showing in a meeting closed to the public. The hearing officer shall have discretion to limit attendance at any closed meeting to the hearing officer and the person or party seeking the protective order.

(4) If granted, the protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves. Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.

(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.

(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony covered by the protective order, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties.

(7) The hearing office shall make a record of all closed meetings that are ordered under this section. The record shall be sealed and made available, upon appropriate order, to the executive officer, on reconsideration, or to the court on review.

(8) If the hearing officer denies a motion for protective order or grants a protective order only in part, the order shall not become effective until 10 days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.

NOTE: Authority cited: Sections 39600, 39601, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; and Sections 11185, 11191 and 11511, Government Code.

REFERENCE